

MICHAEL M. POLLAK
SCOTT J. VIDA
GIRARD FISHER
DANIEL P. BARER *
JUDY L. McKELVEY
LAWRENCE J. SHER
HAMED AMIRI GHAEMMAGHAMI
JUDY A. BARNWELL
ANNA L. BIRENBAUM
VICTORIA L. GUNTHER

Of Counsel
BARRY P. GOLDBERG
WILLIAM L. BATTLES

* CERTIFIED SPECIALIST, APPELLATE LAW
STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

POLLAK, VIDA & FISHER
ATTORNEYS AT LAW
11150 WEST OLYMPIC BOULEVARD
SUITE 980
LOS ANGELES, CALIFORNIA 90064-1839

TELEPHONE
(310) 551-3400
FAX
(310) 551-1036
E-MAIL
law@pvandf.com
INTERNET
www.pvandf.com

July 29, 2011

Direct Dial: (310) 203-1621

Garrett Therolf
Reporter
Los Angeles Times
Via e-mail only: Garrett.Therolf@latimes.com

Re: Bureau of State Audits, Audit 2011-101
Our File No. : 7550.093

Dear Mr. Therolf:

I am assisting the County of Los Angeles Board of Supervisors as outside counsel regarding the Bureau of State Audits' Audit 2011-101. The County has asked me to respond to the questions you e-mailed to County Counsel Andrea Ordin on July 28, 2011.

The County disagrees with Bureau Chief Legal Counsel Sharon Reilly's representation of the State Auditor's office's interaction with the Count in Ms. Reilly's July 5, 2011 letter. The County has not refused to cooperate with the Bureau's audit. Contrary to the letter's representations, the County has cooperated, and will continue to cooperate, with the Bureau's audit.

As discussed in my letter of June 29, 2011 to Ms. Reilly, a copy of which is attached, the County has provided the Bureau with dozens of boxes of files and records. The County DFCS has copied roughly 12,000 pages of documents for the auditors. It has made DCFS employees available to the auditors for interviews; provided access to regional offices; provided access to online databases and DCFS policies; and provided extensive documents concerning child fatalities. It has withheld only attorney-client privileged materials. The Bureau's statutory right to obtain documents does not extend to attorney-client privileged documents.

In addition, the letter's descriptions of specific discussions between the County and Bureau personnel contain inaccuracies. On page 2 of the letter, Ms. Reilly disagrees with my characterization of my discussion with Associate Chief Counsel for the Bureau, Sharon Neville. But my characterization of that discussion, as set forth on page 5 of my June 29, 2011 letter, is correct.

On page 3 of her letter, Ms. Reilly asserts that I have “engaged in confusing tactics” by “offering perhaps to provide [the Bureau] with a single death report.” In fact, in discussion with the Bureau’s attorneys, I raised as a hypothetical possibility whether receiving an exemplar document would satisfy the purposes of the audit.

I certainly disagree with Ms. Reilly’s statement that I have mischaracterized any of my or the County’s discussions with the Bureau.

You have asked about the principles involved in the County declining to provide the Bureau with attorney-client privileged materials. As discussed in my June 29 letter, in addition to the County’s established right to protect its communications with its attorneys, the County seeks to preserve its ability to candidly evaluate its child protective services, and opportunities to improve those services, to further protect the Children under the County’s care.

Further, in regard to current or potential litigation against the County, the County wishes to preserve the same right any person or organization facing litigation has: The right to privileged consultation with its attorneys.

The County has expressed to the Bureau’s attorneys the County’s willingness to explore alternative means by which the Bureau can obtain the information it seeks. The Bureau’s attorneys, however, have declined to discuss any alternative to production of privileged documents. Further, the Bureau has declined to explain why the extensive information the County has provided in the audit is insufficient to allow it to thoroughly evaluate the structure of the County’s child protection services.

In response to your other questions, the audit issue has been discussed in closed session with the Board of Supervisors. And the County is asserting attorney-client privilege as to all of the documents subpoenaed, including attorney-client privileged DCFS materials.

The County has not blocked the audit. It has cooperated with the audit. It seeks only to protect the privileges necessary for it to do its job.

Very truly yours,

POLLAK, VIDA & FISHER

DANIEL P. BARER

Garrett Therolf
July 29, 2011
Page 3

G:\WPDOCS\7550\7550.093\C\Therolf.dpb.072911.wpd

MICHAEL M. POLLAK
SCOTT J. VIDA
GIRARD FISHER
DANIEL P. BARER *
JUDY L. McKELVEY
LAWRENCE J. SHER
HAMED AMIRI GHAEMMAGHAMI
JUDY A. BARNWELL
ANNA L. BIRENBAUM
VICTORIA L. GUNTHER

POLLAK, VIDA & FISHER
ATTORNEYS AT LAW
11150 WEST OLYMPIC BOULEVARD
SUITE 980
LOS ANGELES, CALIFORNIA 90064-1839

TELEPHONE
(310) 551-3400
FAX
(310) 551-1036
E-MAIL
law@pvandf.com
INTERNET
www.pvandf.com

Of Counsel
BARRY P. GOLDBERG
WILLIAM L. BATTLES

* CERTIFIED SPECIALIST, APPELLATE LAW
STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

June 29, 2011

Direct Dial: (310) 203-1621

Via E-mail and Regular Mail

Sharon Reilly
Chief Legal Counsel
California State Auditor, Bureau of State Audits
555 Capitol Mall, Suite 300
Sacramento, CA 95816

Re: Audit of Los Angeles County's Department of Children and Family Services

**Meet and Confer Letter Regarding Administrative Subpoenas for Attorney-Client
Privileged Documents**

Dear Ms. Reilly:

I have been retained in this matter as outside counsel for the Board of Supervisors of the County of Los Angeles. I write concerning the administrative subpoenas the Bureau of State Audits has served upon the County's Department of Children and Family Service ("DCFS"), the County Counsel, and the lead attorney for the Children's Special Investigation's Unit ("CSIU") (who serves as special counsel to the Board of Supervisors).

In your June 27, 2011 e-mail, and the teleconference on June 28, 2011 in which I participated with attorneys Donna Neville, Scott Baxter, and Stephanie Ramirez of your office, your office has unequivocally demanded that the County produce the attorney-client-privileged documents subpoenaed by the production date of July 7, 2011. Your office has declined to continue this deadline, despite the holiday weekend. Your office has also asserted that it refuses to discuss any alternative to producing these documents.

Nevertheless, in an effort to resolve this matter without court proceedings, I am writing to express our position, and to ask you to reconsider negotiations with us for informal resolution of this matter.

As you know, the County has cooperated with the Bureau's audit. It has produced dozens of boxes of files and records. DCFS has copied roughly 12,000 pages of documents for the auditors. The County has made DCFS employees available for interviews. It has provided access to regional offices, access to online databases, DCFS policies, and extensive documents concerning 25 child fatalities. The County has spent approximately \$30,000 for County employee time expended in responding to auditor requests. The documents and information provided should be more than sufficient to supply the information you need for Item No. 9 of your February 16, 2011 Analysis of Audit Request. Despite our requests, the Bureau has not clarified why the data the County has provided is not sufficient to meet the Bureau's needs.

The only records and documents requested by the Bureau that the County has not produced are those protected by privilege. These documents include reports in which the County's attorneys provide frank, candid legal analyses of dependent child fatalities, on the expectation that these privileged reports would not be shared with any outside body.

Your office maintains that the law entitles them to review and critique those documents, regardless of privilege.

As explained below, that conclusion is incorrect. Your demand for privileged documents threatens, among other privileges, the attorney-client privilege that is the bedrock of American jurisprudence.

Further, your office's demand that the County produce self-critical documents, and subject them to the Bureau's critique, threatens to destroy the very type of child protection -- unfettered self-evaluation -- that this audit seeks to promote.

We therefore request that the Bureau's attorneys contact me, and discuss whether they are willing to discuss alternative means of providing the Bureau with information about the County's self-evaluation that do not require the County to produce privileged documents. Since I will meet with the Board of Supervisors in closed session on July 5, 2011 to discuss the County's next step, I request that you or the Bureau's other attorneys contact me before that date to discuss this matter.

Discussion

1. The Bureau Has No Legal Right to Breach Attorney-Client or Any Other Statutory Privilege

Your office's attorneys have asserted to me that the Bureau's longstanding interpretation of Government Code § 8545.2 -- which gives the Bureau access to "confidential" documents, but does not mention privileged documents -- allows the Bureau to demand the production of privileged documents. They deem "confidential" synonymous with "privileged." We have asked those attorneys for cases, regulations, or other authorities supporting their interpretation. They have not

provided any. Nor can they. Their interpretation runs contrary to established law.

When courts interpret statutory language, “Confidentiality does not equate with privilege.” (*Department of Motor Vehicles v. Superior Court (People)* (2002) 100 Cal.App.4th 363, 372-373.) *Davies v. Superior Court (State)* (1984) 36 Cal.3d 291, 298 explained the difference between confidentiality and privilege: A “confidentiality” provision limits the persons who may properly view information; but a “privilege,” as defined in Evidence Code § 911, authorizes a person to refuse to produce the documents in discovery or litigation. (Accord, *White v. Superior Court (Ortega)* (2002) 102 Cal.App.4th Supp. 1, 4.) Therefore, California courts have repeatedly held that when a statute discusses only confidentiality, it is not discussing privilege. (*Los Angeles Unified School Dist. v. Trustees of the Southern California IBEW-NECA Pension Plan* (2010) 187 Cal.App.4th 621, 629.)

Had the Legislature intended Government Code § 8545.2 to permit the Bureau to obtain and review privileged documents, it would have said so in the statute. In fact, it did just that in a statute similar to § 8545.2 : Penal Code § 6126.5, which governs the Inspector General’s right to audit the Department of Corrections. When passed in 1999, § 6126.5 was virtually identical to Government Code § 8545.2, and only discussed records subject to “confidentiality” provisions. In 2004, however, § 6126.5 was amended to specify that “ No provision of law. . .providing for the confidentiality *or privilege* of any records or property shall prevent disclosure” (subd. (b) [emphasis added].) According to the Senate Bill setting forth the amendment, the amendment was added to “*expand* access by the Inspector General to certain records” (Legislative Counsel’s Digest, SB 1352.)

Further, the difference between “confidentiality” and “privilege” is crucial in this context. When an agency has the power to compel production of documents and testimony, the same privileges that apply in a court action apply, “[e]xcept as otherwise provided by statute.” (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 714-715.) In particular, the agency’s power to compel “must be tempered by the attorney-client privilege, unless there is *unambiguous* statutory directive to the contrary.” (*Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 38 [emphasis added].) Courts may not imply unwritten exceptions to statutory privileges. (*Roberts v. City of Palmdale* (1994) 5 Cal.4th 363, 373.)

In the face of these authorities, the Bureau’s own administrative interpretation of § 8545.2 carries little weight. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 14-15.)

In light of these rules, a court would almost certainly rule that Government Code § 8545.2 does not permit the Auditor to pierce attorney-client or other statutory privileges. A contrary result is particularly unlikely in view of the other consequences of piercing privilege in this case, discussed below.

2. Forcing Production of Privileged Documents in This Case Threatens to Chill the Self-Evaluation This Audit Seeks to Promote

Assemblymember Perea has requested this audit of county child protective service programs in order to protect children. Specifically, Objective 6 in the Assembly Member's February 14, 2011 letter is intended to promote county self-evaluations after a child in a county CPS program dies. The County of Los Angeles engages in such self-evaluations to a degree few, if any, other California counties do. Yet the Bureau's demand for privileged documents concerning that self-evaluation threatens future self-evaluation.

The Bureau has subpoenaed both reports provided directly to County Counsel for purposes of legal evaluation of child fatalities; and the County's and Board of Supervisors' attorneys' memoranda and reports to the Board in which they analyze these deaths -- and what failures might have lead to them -- from a legal perspective. These documents are produced under the attorney-client privilege. Therefore, the attorneys and reporting parties are free to candidly and frankly discuss what went right and what went wrong in the County's systems and processes -- secure in the knowledge that the evaluations are between the County and its attorneys. The law does not require these measures. But the County undertakes them to protect the children under its care.

This particularly applies to the reports of the Children's Special Investigations Unit. By County ordinance (section 6.44.060 of the Los Angeles County Code), the CSIU, a department of the Board of Supervisors, conducts independent legal reviews involving child death or injury caused by abuse or neglect. The CSIU's lead attorney serves as special counsel to the Board. The County Code prescribes that the CSIU provides its reports directly to the Board, on an attorney-client basis. This system fosters forthright legal analysis of child fatalities, and recommendations for improvement in the future.

But the Bureau now seeks these documents. Further, it apparently seeks them so that it can critique the self-examination, and publicly report its conclusions.

Therefore, if the Bureau obtains the documents, and the County continues to request these legal reports in the future, the attorneys preparing the reports will have to bear in mind that any criticisms they make might may end up in front of an outside auditor some day.

Like a scientist who dissects an animal to study it, the Bureau's demand for privileged documents threatens to destroy the very thing the Bureau is studying. That cannot have been the Legislature's intention for this audit.

3. The Bureau's Interpretation of Its Statute Threatens Attorney-Client Privilege for Every State Agency and Local Government in California

"[P]ublic entities need confidential legal advice to the same extent as do private clients[.]" (*Roberts v. City of Palmdale*, *supra*, 5 Cal.4th 363, 374.) State agencies and local governments throughout California rely on the attorney-client privilege to foster open discussions on evaluating the laws governing their functions, on legal liability and strategies for addressing it, and on how best to execute the laws they are charged with executing and upholding. No doubt the Bureau itself relies on the confidential advice of its attorneys.

Interpreting Government Code § 8545.2 to permit the Bureau to compel production of privileged documents threatens that privilege for every state agency and local government in California. If every California city, county and agency knew that any piece of privileged attorney advice or discussion it receives might be disclosed to an outside auditor for critique, those entities would be chilled in their discussions with their attorneys.

Should this matter reach the courts, it is difficult to see any court sanctioning this wholesale abrogation of a privilege that is central to American jurisprudence -- especially when the statute is silent on privileges.

4. The Bureau's Demand for Privileged Documents Concerning Ongoing Litigation Conflicts with Its Own Policies

In my June 27, 2011 meeting with Associate Chief Counsel for the Bureau, Donna Neville, Ms. Neville asserted that she did not know of previous examples of the Bureau obtaining attorney-client communications setting forth advice to governing bodies. She said that the question had not come up in the past, because the Bureau prefers not to "insert itself" into pending litigation.

Yet of the 25 child fatalities on which the Bureau has subpoenaed documents, 11 of them are the subject of ongoing litigation or pre-litigation claims for damages. The Bureau is demanding that the County produce attorney-client communications in ongoing litigation.

We are aware of the protections of privileged documents set forth in Government Code § 8545 and the Bureau's own protocols. But the Bureau will still produce a report setting forth data, critique, and conclusions of County self-examination in ongoing litigation. Although the Bureau has offered to work with the County in protecting privileged information, the Bureau has the ultimate discretion on how to use that information. Moreover, although the County has requested that the Bureau agree to indemnify the County if, in the future, the County must defend itself against allegations that by complying with the audit it waived the attorney-client privilege, the Bureau has refused to do so.

As explained next, County compliance with the subpoena, as currently framed, poses a danger of such waiver allegations.

5. If the Statute Is Interpreted as Not Applying to Privileged Documents, Compliance Might Be Attacked as Waiver

Under Evidence Code § 912, an uncoerced disclosure of a significant part of a privileged communication is a waiver of that communication. The Bureau is asking the County to disclose privileged communications under Government Code § 8545.2. And, as explained above, a court is unlikely to interpret § 8545.2 as applying to privileged documents. Therefore, if the County provides the Bureau with privileged documents under § 8545.2, it may face a future argument that by doing so it waived the privileges that protect those documents.

We do not concede that any such argument would have merit. But that does not lessen the potential that it will be asserted.

6. The Privileged Documents Sought Are Not Necessary to the Audit

Finally, despite consultation with the Bureau's attorneys, we have not yet received an explanation of why the Bureau needs the privileged documents for their audit, and has refused any offer of alternatives. The County has already provided the Bureau with the non-privileged factual data it has requested concerning the child fatalities being reviewed. Objective No. 9 in the audit seeks information on whether the County conducted self-evaluations. The information already produced should answer that question. If it does not, the County is willing to discuss alternative methods of providing information about the methods of self-evaluation it undertook, without revealing the privileged documents regarding those evaluations. Yet your attorneys have unequivocally refused those offers, and demanded compliance with the subpoenas.

We hope that after reviewing this letter, the Bureau will be willing to discuss alternatives to producing privileged documents under the subpoena.

CONCLUSION

The County has cooperated with the audit. It has provided the Bureau with the documents and information it has requested, with the exception of matters protected by privilege. For the reasons above, the County must defend its privileges.

I invite you or the Bureau's other attorneys to contact me before July 5, 2011 to discuss whether you are willing to entertain alternative means of providing information about the County's self-evaluations that will not require production of the privileged material itself. I regret that this period of time includes the long Fourth of July weekend; but the timing is required by the compliance date the Bureau set for its subpoenas and its refusal to grant an extension.

Sharon Reilly
June 29, 2011
Page 7

I will be out of my office from Friday, July 1, 2011 through Monday, July 4, 2011. But I will provide you (via separate e-mail) with my contact information during that time.

I hope that we will be able to resolve this matter without court involvement. But if the Bureau continues to demand privileged documents, the County will act to preserve its privileges.

Very truly yours,

POLLAK, VIDA & FISHER



DANIEL P. BARER

DPB:dpb

cc: (By mail)

Elaine M. Howle, State Auditor
Honorable Henry T. Perea, Assemblymember, 31st District
Honorable Ricardo Lara, Chair, Joint Legislative Audit Committee
Honorable Robert Dutton, Senate Minority Leader and Vice Chair
Joint Legislative Audit Committee
Honorable Luis A. Alejo, Member, Joint Legislative Audit Committee
Honorable Elaine Kontominas Alquist, Member, Joint Legislative Audit Committee
Honorable Joel Anderson, Member, Joint Legislative Audit Committee
Honorable Kevin De Leon, Member, Joint Legislative Audit Committee
Honorable Tim Donnelly, Member, Joint Legislative Audit Committee
Honorable Alyson Huber, Member, Joint Legislative Audit Committee
Honorable Doug La Malfa, Member, Joint Legislative Audit Committee
Honorable William W. Monning, Member, Joint Legislative Audit Committee
Honorable Chris Norby, Member, Joint Legislative Audit Committee
Honorable Michael Rubio, Member, Joint Legislative Audit Committee
Honorable Cameron Smyth, Member, Joint Legislative Audit Committee
Honorable Lois Wolk, Member, Joint Legislative Audit Committee

(via e-mail and mail)

Michael D. Antonovich, Supervisor, County of Los Angeles
Gloria Molina, Supervisor, County of Los Angeles
Mark Ridley-Thomas, Supervisor, County of Los Angeles
Zev Yaroslavsky, Supervisor, County of Los Angeles
Don Knabe, Supervisor, County of Los Angeles
Sachi A. Hamai, Executive Officer, Board of Supervisors